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ABSTRACT

This position paper of the Academic Senate for California Community Colleges examines the increasing use of technology in education and the fundamental, academic implications of this increase for the traditional understanding of academic freedom, privacy, copyright, and fair use. This is the third paper in a four-part series. The widespread use of computer email systems for both faculty and student communication, and of web sites and the Internet for research, teaching, and dissemination has raised concerns regarding the protection of academic freedom. This paper examines a variety of educational computer use policies and makes recommendations for good practice in this area. In addition, the paper discusses evolving interpretations of copyright and fair use in light of the availability of digital material, and makes recommendations to both authors and users of this material. Finally, it provides a philosophical setting for discussions of intellectual property issues. Specific recommendations for involvement and action of local academic senates are included, as well as suggestions to faculty in general. The paper argues for faculty behaving less like buyers and sellers and more like a single, global consciousness in pursuit of knowledge. Includes an annotated bibliography with 67 categorized references. (NB)

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ED 482 188

Academic Freedom, Privacy, Copyright and Fair Use in a Technological World

The Academic Senate for California Community Colleges

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ABSTRACT

This position paper of the Academic Senate for California Community Colleges examines the increasing use of technology in education and the fundamental, academic implications of this increase for the traditional understanding of academic freedom, privacy, copyright and fair use. It is third in a series of four related papers that have already discussed academic freedom in a more general setting and instructor-student contact in distance education. The fourth paper will discuss more specific details of technology implementation in both the academic and the collective bargaining setting.

The widespread use of computer Email systems for both faculty and student communication, and of websites and the Internet for research, teaching and dissemination, has raised new concerns regarding the protection of academic freedom. This paper examines a variety of educational computer use policies and makes recommendations for good practice in this area. In addition, the paper discusses evolving interpretations of copyright and fair use in light of the availability of digital material, and makes recommendations to both authors and users of this material. Finally it provides a philosophical setting for discussions of intellectual property issues. Specific recommendations for involvement and action of local academic senates are included, as well as suggestions to faculty in general. The paper also provides an annotated bibliography of currently available reference material.

INTRODUCTION

For many years, the Academic Senate for California Community Colleges has played a leading role in the successful development and introduction of technology into the curriculum. The increasing use of technology in teaching has resulted in significant changes in the ways that faculty and students work. Email has become a routine means of scholarly communication while websites and the Internet have become a major vehicle for research, dissemination and delivery of course material. Students have participated in these changes through technology mediated instruction, use of multimedia, Email and other Internet activities.

The Academic Senate has helped to shape this change with a series of position papers on the curriculum and on pedagogical issues involved in technology and distance learning:

> November 1993, "*Distance Education in the California Community Colleges: An Academic Senate Review of the Social, Fiscal and Educational Issues*,"
>
> November 1995, "*Curriculum Committee Review of Distance Learning Courses and Sections*,"
>
> November 1997, "*Guidelines for Good Practice: Technology Mediated Instruction*,"
>
> April 1999, "*Guidelines for Good Practice: Effective Instructor-Student Contact in Distance Learning.*"

However, in parallel with this rise in the use of technology has come an increasing concern regarding the related issues of academic freedom, copyright and fair use in an electronic environment. The Academic Senate's Spring 1998 position paper, "Academic Freedom and Tenure: A Faculty Perspective," reiterated the Academic Senate's traditional support for academic freedom in research and teaching, but did not address changes caused by the development of electronic communication. This paper will examine some of these recent academic and philosophical issues, as directed by the following resolution from the Spring 1998 Plenary Session:

S98 11.01 Internet-based Instruction

> *Whereas faculty are increasingly involved in development and use of electronic material, and*
>
> *Whereas expansion of Internet-based instruction and communication via e-mail has created new venues for the use of such electronic material, and*
>
> *Whereas protection of faculty rights to their own materials and the fair use of materials developed by others has both academic and workload implications,*
>
> *Therefore be it resolved that the Academic Senate for Community Colleges, in*

conjunction with faculty union leadership, develop and disseminate a position paper on intellectual property rights, privacy rights, and copyright as they apply to electronic media, especially e-mail, multimedia, and use of the Internet.

Prompted by an additional resolution from the Spring 1999 Plenary session, a later paper in the series will examine the "nuts and bolts" issues of technology and teaching, from both a curriculum and a collective bargaining standpoint.

S99 11.01 Effective Instructor-Student Contact in Distance Learning

Whereas there are issues related to distance learning that are properly the purview of collective bargaining and some areas that are relevant to pedagogy and academic and professional issues,

Therefore be it resolved that the Academic Senate for Community Colleges direct the Executive Committee to develop a paper, in collaboration with our collective bargaining colleagues, covering such areas as faculty load, class size, compensation and related issues, with regard to distance learning and teaching.

In the last few years, there has been considerable interest and public discussion of many of these issues: the United States Congress has worked on copyright and Internet issues; Email privacy has been a contentious legal issue in private industry; copyright and fair use have been a growing concern as faculty implement distance education and multimedia enhancements of course material. As the National Education Association Technology Brief "Distance Education: Challenges and Opportunities" states:

> As the financial stakes are raised, intellectual property rights and faculty rights increasingly become intertwined. Institutions that previously asserted no ownership claim to a scholarly book are rethinking their policies on intellectual property rights.

However, most of this discussion, particularly in the privacy area, has been of a legal nature and has taken place in the private sector rather than within higher education.

The Fall 1998 Plenary Session of the Academic Senate featured a breakout session to collect faculty concerns in preparation for this position paper. Those present at the breakout were most immediately concerned with academic freedom and its most visible manifestation in the shape of Email privacy. The breakout discussed three interconnected aspects of the larger issue:

- Academic freedom to teach, research, communicate and publish in a technological environment.
- User considerations in copyright, fair use and availability of material from the Internet.
- Author considerations of property rights, compensation and use in distance education

and technology mediated instruction.

This paper will present a limited examination of these interconnected issues. It makes no claim to provide definitive legal answers in a situation that changes almost daily. For example, at the time of writing, Pamela Mendels in the *New York Times* reports that a federal appeals court in Virginia has just upheld a law restricting computer access for state employees. The law had been challenged by the American Civil Liberties Union on behalf of six professors at state universities and colleges. On another front, Wendy Grossman in *Scientific American* reports that American companies may soon experience difficulty because a European Union's legally binding privacy directive prohibits exchange of data with countries that do not have equivalent levels of privacy protection.

Despite the complex and rapidly changing situation, this paper provides a brief examination of copyright issues and practice. Several of the documents listed in the bibliography perform a more comprehensive analysis. Rather, this paper will make a principled examination of the current situation, from a faculty point of view, and make recommendations for involvement of local academic senates.

ACADEMIC FREEDOM AND PRIVACY

The Academic Senate's interest in privacy, copyright and fair use issues differs in two major respects from much of the debate that has been taking place in private industry, and that has resulted in several lawsuits and congressional proposals for legislation. In the first place, the Academic Senate's discussion takes place in the different and more general context of academic freedom in higher education institutions. There is long-standing protection for the right of free inquiry, the right of free expression and the concept of no prior restraint. Furthermore, student right-to-privacy requirements impose a significantly higher standard on the confidentiality of communications in an educational setting (see discussion of FERPA (Family Educational Rights and Privacy Act) and Counseling Ethics in the following Email privacy section).

The traditional background for academic freedom is based on the American Association of University Professors (AAUP) "1940 Statement of Principles on Academic Freedom and Tenure." A much more recent AAUP report, "Academic Freedom and Electronic Communications," provides an excellent framework for the current discussion.

Particularly relevant is the report's statement that:

> One overriding principle should govern such inquiry: Freedom of expression and academic freedom should be limited to no greater degree in electronic format than in printed or oral communication, unless and to the degree that unique conditions of the new media warrant different treatment.

Computer/Electronic Use Policies

The same AAUP report comments that this principle of freedom must include several parts:

- Freedom of research, including access to information in electronic format.
- Freedom of publication, including the ability to post controversial material.
- Freedom of teaching, including the extended classroom produced by distance education.

Access to computers and electronic networks is now an important component of research, publication, and teaching. This access and communication is largely controlled by an institution's computer/electronic use policy. Therefore an obvious place to start an examination of this principle is the electronic use policies at various higher educational institutions in California. In developing or reviewing policy language, local academic senates may find the following examples useful in developing a sufficiently strong statement of their own. Local computer use policies can affect academic freedom in many of the areas that they address, including Email, Internet access, websites and permissible uses.

The following excerpts from the University of California "Electronic Mail Policy" make a strong statement of principle by explicitly recognizing academic freedom and the role of the academic senate in implementing effective procedures.

> The University recognizes that principles of academic freedom and shared governance, freedom of speech, and privacy of information hold important implications for electronic mail and electronic mail services. The University affords electronic mail privacy protections comparable to that which it traditionally affords paper mail and telephone communications. This Policy reflects these firmly-held principles within the context of legal and other obligations . . .
>
> . . . Where the inspection, monitoring, or disclosure of e-mail held by faculty is involved, the advice of the Campus Academic Senate shall be sought in writing in advance.

In contrast, one California community college district's "Computer and Technology Use" policy contains a statement that is perhaps realistic but lacks any support for academic freedom. It simply gives a warning about technical constraints but makes no statement of basic principles. It is important that both principle and caution be present.

> The systems have the ability to read your mail: your own account, and the system administrator account. While reasonable attempts have been made to ensure the privacy of your accounts and your electronic mail, this is no guarantee that your accounts or your electronic mail is private. The systems are not secure, nor are they connected to a secure network.

This final example from the California State University Office of the Chancellor "Internet Use Policy" uses precisely the broad language that the AAUP report warns against when it comments

that colleges and universities often try to restrict electronic access to material that would rarely be restricted in print format. AAUP suggests that only material that would be unlawful in print should be banned or removed from computer systems.

> Chancellor's Office personnel are prohibited from utilizing California State University information resources for any unlawful, unethical, or unprofessional purpose or activity. Examples of prohibited uses include but are not limited to:
>
> . . . intentional access or dissemination of materials which can be considered pornographic.

Such broad language fails to protect academic freedom, and suggests anonymous censorship that would not be acceptable for print material in a college library.

Another disturbing feature of many electronic use policies is the suggestion that the right to computer access has a low priority. Computer access is often portrayed as a privilege that may be suspended or terminated for perceived violations of use policy; note this example from a California community college "Rules for Internet Use":

> An individual's computer use privileges may be suspended immediately upon the discovery of a possible violation of these rules. Such suspected violations will be confidentially reported to the appropriate system administrator.

The AAUP report comments that restrictions on library access and publication are highly unusual and that restrictions on computer access should have a comparable process and meet comparable standards to any library access policy. Theoretical perceptions of possible abuse should not drive the creation of use policies.

In summary, since research, publication and teaching now make intensive use of electronic media, the well established reasons for academic freedom must be applied in these new areas. Academic freedom provides the strong moral argument for educational institutions to extend equivalent protections from the print setting into the electronic environment even if clear legal requirements do not yet exist. The latest information from the Digital Millennium Copyright Act is reviewed in the second part of this paper. It is the position of the Academic Senate for California Community Colleges that local academic senates should use the principle of academic freedom to guide the development and review of their local computer use policies.

Email Privacy

Another area which local academic senates should address is the security of Email correspondence, both as it is used between faculty, and, increasingly with the growth of distance education, as it is used for instructor-student communications. Guidelines for effective instructor-student contact encourage a rich variety of technological communication. This poses a practical dilemma. Such instructor-student communication might inadvertently involve advising or other confidential information. Avoidance is the safest solution but may inhibit the very richness of

communication that we strive to provide. Under the 1974 Federal Family Educational Rights and Privacy Act (FERPA), colleges are required to protect the confidentiality of basic student records and data. Even more important is to protect the confidentiality of faculty-student communication and counselor-student advising as described in the ethical standards for counselors laid out in the American Counseling Association Code of Ethics and Standards of Practice (1997), which states:

> Respect for Privacy. Counselors respect their clients' right to privacy and avoid illegal and unwarranted disclosures of confidential information.

Thus colleges that use technology and distance education must be able to provide adequate student services in a secure, confidential environment. Since any deliberate Email surveillance is almost guaranteed to involve student interactions, a college's difficulty in protecting faculty-student Email could possibly jeopardize the whole concept of technology mediated distance learning as practiced by a rapidly increasing number of colleges.

However, most use policies make the comment that electronic communication and especially the Internet tend to be public mediums and warn users that it is virtually impossible to guarantee privacy. Faculty should clearly exercise considerable caution. The Privacy Rights Clearinghouse document "Privacy in Cyberspace: Rules of the Road for the Information Superhighway" states:

> There are virtually no online activities or services that guarantee an absolute right of privacy.

But the *a priori* assumption of confidentiality as quoted earlier from the University of California policy is clearly a principle worth stating. The argument laid out above for protection of faculty-student Email could, in practice, extend to the protection of all Email, including faculty-faculty Email. But there is an additional argument for protection of faculty-faculty Email in the academic freedom setting. It is a long accepted educational position that students in large part gain their own academic freedom by observing the example set by the faculty. This tradition of teaching by example would be rendered ineffective here if the faculty themselves could not demonstrate adequate protection.

The lack of adequate protection can also lead to a significant negative effect on campus climate and employee morale. This effect has already been observed on at least two different occasions when the administration at a California community college searched the Email records or computer files of faculty. In one case the college later adopted a comprehensive privacy and access policy.

In the private sector, court cases have generally held that internal Email systems belong to the employer and that message interception is therefore acceptable. In "E-mail Privacy: What Are Your Rights?" Jonathan Wallace describes a classic case involving a Pillsbury employee who was fired for sending Email critical of the company.

In contrast, in higher education, there is little clear legal precedent on Email privacy. It should be forcefully argued that, in light of academic freedom, different standards and ethics must prevail

in higher education. While Title I of the Electronics Communications Privacy Act prohibits intentional, unauthorized interception of electronic communication in transit, it then proceeds to authorize interception either by the provider of the service, or if prior consent has been given. Sipior and Ward, in "The Ethical and Legal Quandary of e-mail Privacy," provided a fairly detailed analysis of the legal issues surrounding Email from both the employee and the employer perspective, but they do not specifically address the higher education sector.

Many electronic use policies effectively require advance consent for interception as a condition of access, and make no acknowledgment of principles of privacy. For example, one California community college district's "Technology Use Policy" contains this disturbingly broad language:

> The District shall have the right to access all communication systems to ensure integrity and security.

In contrast, another California community college district's "Procedures and Guidelines for Telecommunications Access and Use" starts with a strong statement of principle on Email:

> The District considers Email transmitted using District resources to be private correspondence between the sender and recipient and will not monitor it for content.

Local academic senates should urge inclusion of a similar statement of principle in their local computer use policies, even though absolute privacy cannot be guaranteed.

In 1999, California State Senate Bill 1016 (Bowen), would have prohibited an employer from secretly monitoring the electronic mail or other personal computer records generated by an employee. Although the bill was passed by both the Senate and the Assembly it was vetoed by Governor Davis in October 1999.

In an educational environment, it is clearly valuable for the institution to state the principled belief that there is a strong initial presumption of privacy, (notwithstanding technical difficulties). To violate that initial expectation requires exceptional circumstances, and there must be a clearly defined process that involves the local academic senate (as in the University of California "Electronic Mail Policy," mentioned above). The National Education Association brief "E-mail and Privacy" suggests that, absent strong federal or state statutes protecting Email communications in the educational setting, the best safeguard is to negotiate strong collective bargaining contract language in this area. The most recent position in the AAUP September 1999 issue of *Academe* reflects the dual recommendations of this paper: make a statement of principle, but also urge caution. Author Jonathan Alger states "In an era in which colleges are encouraging faculty members to teach, conduct research, and communicate with students on-line, they can best protect academic freedom and the integrity of their institutional mission by respecting the privacy of these communications."

While it is important to avoid greater restrictions on electronic communication than those extended to spoken or written communication, it must also be recognized that there are traditional individual responsibilities of faculty and students that accompany academic freedom in any me-

dium. The 1940 Statement of Principles on Academic Freedom and Tenure observes that faculty must "exercise appropriate restraint", "respect the opinions of others", and "indicate when they are not speaking for the institution". These responsibilities are perhaps especially important owing to the immediacy of much electronic communication and the lack of opportunity for contemplation.

Recommendations on Academic Freedom and Privacy

Since there is so much concern in the area of academic freedom and privacy and so many examples of strong and weak policy language it is recommended that local academic senates play a major role when developing policies and procedures:

- To ensure that local electronic/computer use policies include a statement of the fundamental principle of academic freedom in the electronic medium, including Email, websites and online courses.
- To ensure that local electronic/computer use policies include a statement of the fundamental principle of the confidentiality of Email communications, while acknowledging the inherent lack of absolute security.
- To ensure that local electronic/computer use policies guarantee appropriate access to computers and networks for faculty and students.
- To actively involve each local academic senate in creating and implementing the process that deals with possible exceptions or violations of academic freedom and privacy.
- To consult with collective bargaining colleagues to ensure contract language creating and implementing the process that deals with confidentiality and with possible exceptions and technical safeguards or limitations.

COPYRIGHT AND FAIR USE ISSUES

Traditionally, intellectual property rights have been preserved and protected by three mechanisms: copyrights, trademarks and patents. After distinguishing between these three forms of protection, this section will focus primarily on copyrights. Fair use is discussed in the section entitled "Standpoint of the User."

Copyrights protect the development of ideas that are original or are expressed in original ways. Books and newspapers are copyrighted and copyrights can apply to all written materials, including poems, short texts, pamphlets and syllabi, in short anything that might be published. With the advent of television, copyrights were extended to programs: news broadcasts commonly end with an indication of copyright ownership.

Trademarks apply to brand names that associate a company with a particular product. Perhaps the most famous trademark change in the last few decades is that of a major oil company concerned about the number of non-company products being sold around the world sporting the company's name and logo. Computers were used to search for a name that was not used anywhere in the world by anyone, no matter what the product. The result was EXXON. This exer-

cise showed the protective nature of trademarks: they aim to prevent imitations being sold as the known product.

Patents apply to inventions from machines to medicines, and by extension to procedures and manipulations of nature (such as systematically mutating plant DNA for developing vegetables resistant to insects). Patents, like copyrights and trademarks, allow the creators to profit from their work.

Although patent issues are crucial to individuals involved in research institutions, including major universities, community college teachers are most likely to find themselves concerned with copyrights. Trademarks will be a concern when faculty develop multimedia materials that may contain company logos, names and products.

Historically, there has been an understanding among teachers: their syllabus and the course materials that they generate are their own. It is also understood that the course outline of record, on file at the college, belongs to the college, though departmental staff is usually responsible for generating and updating it. In the days of dittos and mimeographed handouts, this understanding, vague as it might be, was perhaps sufficient. With the advent and exponential growth of current technologies from Email to online courses, multimedia course materials, and computing work as part of interactive education, the old understanding is seriously deficient. Teachers (and students) are not adequately protected in two ways: they may not be able to preserve their own original work and they risk violating the protections of others when they use others' works.

Copyright Law

Copyright law applies to any work or production immediately upon its expression in any tangible medium. Copyright law protects original work without the need for any positive action by the author. It does not protect ideas or processes, though it does cover expression of those ideas and accounts of processes. Copyrights law protects the creator who brings ideas to fruition as books, poems, drawings, plays, cartoons and other publishable or performable material, including music and works of art. It also provides those who do not possess the copyright to materials fair use access to them. Copyright issues thus affect anyone who produces or uses copyrighted material. There are, then, two perspectives to take into account—that of the individual who holds the copyright and that of the individual who wishes to make use of copyrighted material. Both points of view are addressed in a variety of sources (see the reference list in this paper). The three most relevant bodies of law on copyright are The U.S. Copyright Act of 1976 amended, the Sonny Bono Copyright Term Extension Act of 1998, and the Digital Millennium Copyright Act (DMCA) of 1998. The DMCA attempted to bring United States law in line with the 1996 treaty of the World Intellectual Property Organization (WIPO).

The essential source for copyright information is the United States Copyright Office, Library of Congress, 101 Independence Ave., S.E., Washington, D.C. 20559-6000. Its Public Information Office phone number is (202) 707-3000. The U.S. Copyright Office maintains a comprehensive website at: http://lcweb.loc.gov/copyright that includes a frequently asked questions section, as well as full texts of copyright laws, legislative updates, international laws and some current

analyses and interpretations of law. Within the answers provided to the questions section, there are links to U.S. Copyright Office circulars that analyze a variety of issues in detail.

Among useful secondary sources, several cover all forms of copyright: "Fair Use Guidelines for Educators," compiled by Linda K. Enghagen, includes wording from the copyright law of 1976. "Fair Use Guidelines for Educational Multimedia" suggests guidelines for multimedia use of material in an instructional setting. In addition, the California Department of Education has issued "Suggested Copyright Policy and Guidelines for California's School Districts" a set of guidelines that local boards might use in formulating school district policies. While there is general agreement in the guidelines these documents offer, they all urge teachers and users of copyrighted material to seek legal advice tailored to their distinctive conditions.

As described in "Fair Use Guidelines for Educators," *copyright* gives the holder or owner *exclusive control*, (but see also *fair use*), of the copyrighted work, including the right to reproduce it and to create derivative works based on it, the right to publish it (including selling, renting, leasing and lending), the right to perform it publicly and the right to display it in public. *Infringement* of copyright occurs when someone violates this exclusive control. *Fair use* covers those instances when an individual may use copyrighted work without obtaining prior permission and without infringing copyright. The Copyright Act of 1976 allows for fair use, including quotation for purposes of criticism, comment or news reporting, and for teaching purposes, scholarship and research. The various guidelines referenced above attempt to clarify the lines between *fair use* and *infringement*. These guidelines will be discussed in this paper under the heading "Standpoint of the User."

Standpoint of the Creator

Individuals will have differing points of view regarding their work. Teachers are justly famous for exchanging materials and teaching techniques, often in the form of educational components that are effective in the classroom setting. Some writers believe that scholarly and other materials should be available to anyone who uses them. Others recognize both "pros and cons" of protecting their work: wanting to hold the copyright on published essays and creative writing while insisting that what appears on the Internet—contributions to chat rooms, interest groups and bulletin boards, Email exchanges, and original material posted on websites—should be "public domain" in the sense that anyone should be able to use and reproduce what appears there. Still others wish to have their creative expression protected, either so that it cannot be used in ways the creator would not approve or for potential profit of others.

Though law is clear that the creator of a copyrightable work is automatically the holder of the copyright to that work, (or determines the holder), once the work takes tangible form, there is an important exception to this principle regarding works made for hire. When a work is "made for hire" (in the language of the Copyright Act), it is the property of the employer which can be a firm, organization or an individual. The "complex concept of a work made for hire" requires a review of the statutory definition in the Copyright Act and a survey of court interpretations. (See "Circular 9: Works Made for Hire Under the 1976 Copyright Act," U.S. Copyright Office.) In the case of a work made for hire, the employer is the legal "author" of work. In *CCNV vs. Reid*,

the Supreme Court set out three factors that characterize an employer-employee relationship in which works are made for hire. The first characteristic is the control of the work by the employer, which includes determining how the work is done, whether the work is done at the employer's location and whether the employer's equipment or other means of production is used. The second characteristic deals with control of the employer over the employee, including scheduling the employee's time, giving the employee other assignments outside the production of the work, setting the method of payment and holding the right to hire the employee's assistants. The third characteristic concerns the status and conduct of the employer, such as whether the employer is in business to produce such works and whether the employer provides benefits to the employee and/or withholds taxes from payment for the work.

Circular 9 provides some rather obvious examples of employer ownership of copyright: the creation of a software program as part of a staff programmer's duties; a musical arrangement produced for a company by a salaried arranger on its staff; a sound recording made by a salaried staff member of a record company. Perhaps the most significant example for teachers is the following: "A newspaper article written by a staff journalist for publication in the newspaper that employs him" (Circular 9, p. 2). This example suggests that course materials and other documents and materials created in the line of teaching courses have an ambiguous status. The need for institutional policies and agreements regarding copyright ownership is clear.

Authors who publish articles in professional journals well know the difficulties of maintaining copyright control of their work. Many journals demand copyright ownership as the condition for publishing an article. A quick look behind the title pages of books show that books written for a wide audience are often copyright by the writer, but university and specialized presses just as often hold the copyright. Publication in professional journals and through specialized presses is seldom work for hire as discussed above. Copyright ownership in such cases is an issue deserving close attention of the author.

Although an individual may refuse to exercise any copyright, it remains in place unless specifically renounced by the holder. That release may be whole or partial. For example, in the case of the "Suggested Copyright Policy and Guidelines for California's School Districts" referenced above, the California Department of Education stipulated on the copyright page that "School Districts in California may freely copy all or part of this publication for distribution to their staffs." This is a doubly restricted release of copyright. It implies that only school districts in California may copy this text without permission and then only for distribution to their own staffs. If a school district outside California wanted to reproduce this material, (other than in a fair use context), it would have to seek permission of the California Department of Education. And if a California school district wanted to reproduce this text for individuals other than its staff—for a community conference, for example—it would have to seek permission.
It is unlikely, of course, that the Department of Education is closely scrutinizing the reproduction of this document, but the restriction is clear. If parties others than those granted blanket permission were to reproduce the text, they could find themselves in court. Restrictions of this kind serve to reserve the right to seek remuneration from those not included in the blanket permission

and to seek legal means of halting reproduction beyond this permission. By insisting that others seek permission, the copyright holder can get an idea of where the text is disseminated and by whom.

Even if an individual wanted to preserve all rights under a copyright, all a copyright itself can do is establish the foundation for seeking legal or other redress for violations. The listing of a copyright in a text or at the end of a film broadcast or production establishes this foundation and indicates where permission for use is to be sought. Notice though, that written copyright notice is not required.

Those who do not believe that their work should be copyrighted are in something of a quandary. They want the whole world to have access without fuss. If they renounce their copyrights, others may copyright and then restrict the reproduction of the material in question. Perhaps the preferred route for those who support the free flow of expressed ideas is to indicate copyright and then give blanket permission for reproduction as long as the source is acknowledged. In the example above, the Department of Education gave blanket permission to a defined group, but an individual or an institution could give that permission to any interested party. This approach prevents anyone else from copyrighting the material, since it is already copyrighted, and therefore from restricting distribution.

Standpoint of the User

Both the Copyright Act and fair use guidelines serve to: (1) protect the copyright holder from infringement, and (2) protect the user from accidentally or unintentionally infringing the owner's rights. There is one cardinal principle that applies to all fair use, and that is that full credit must be given to the copyright holder, including owner, publisher or producer, dates and places of publication or performance.

The Copyright Act of 1976, Section 107, gives a general characterization of fair use:

> Notwithstanding the provisions of Section 106, the fair use of copyrighted work, including such use by reproduction in copies of phonorecords or by any other means specified by that section, for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, is not an infringement of copyright. In determining whether the use made of a work in any particular case is a fair use the factors to be considered shall include:
>
> (1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;
> (2) the nature of the copyrighted work;

(3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
(4) the effect of the use upon the potential market for or value of the copyrighted work.

Even a brief analysis reveals that the Act leaves much room for ambiguity. The factors to be considered are not deemed to be exhaustive, but other factors are not listed. While these factors are to be considered, *how* are they to be considered? Listing a factor as "the nature of the copyrighted work" provides no direction in considering that work. Fair use as established by the Act requires guidelines and is open to legal interpretation by courts.

The need to clarify the meaning and scope of fair use was recognized from the moment the Act became law. The Authors League of America, the Association of American Publishers, and a congressional committee, called the Ad Hoc Committee on Copyright Law Revision, reached agreement in 1976 on the meaning of "fair use" regarding books and periodicals. The same congressional committee joined music organizations representing publishers, teachers and institutions to issue fair use guidelines in respect to music, also in 1976. In 1979 a congressional subcommittee worked with various television organizations to produce guidelines for off-air recording of broadcast programming for educational purposes. Only in 1996 did the Council on Fair Use (CONFU) adopt guidelines for multimedia education. CONFU has proposed guidelines for distance learning and for educational fair use for digital images. In addition, CONFU, working with a variety of organizations, issued a statement on the use of copyrighted computer programs (software) in libraries. (All these guidelines may be found in "Fair Use: Guidelines for Educators," compiled by Linda K. Enghagen, J.D., National Education Association, 1997.)

Guidelines, whether agreed to by a congressional subcommittee or proposed by CONFU and organizations working with it, are not laws. The Frequently Asked Questions (FAQ) document on the U.S. Copyright Office's website makes this plain:

> Under the fair use doctrine of the U.S. copyright statute, it is permissible to use limited portions of a work including quotes, for purposes such as commentary, criticism, news reporting, and scholarly reports. *There are no legal rules permitting the use of a specific number of words, a certain number of musical notes, or percentages of a work.* Whether a particular use qualifies as fair use depends on all the circumstances. (Question 47, italics are this paper's.)

Repeating all the guidelines in this paper is not feasible, but for purposes of illustration, the guidelines for reproducing work published in journals and books can be stated.

A teacher who is conducting scholarly research or teaching a class may, under fair use guidelines, make a single copy of a chapter of a book; an article from a periodical or newspaper; a short story, short essay or short poem; a chart, graph, diagram, drawing, cartoon or picture from a book, periodical, or newspaper.

A teacher may make copies of a work for a course, providing that the number of copies made does not exceed one copy per student in that course, and providing that the copying meets tests of brevity, spontaneity, and cumulative effect, and that notice of copyright is on each copy.

Brevity is defined in the guidelines as: a poem of not more than 250 words (if on no more than two pages), a portion of a poem not to exceed 250 words; an article, story or essay of not more than 2500 words, or an excerpt from any prose work of not more than 1000 words or 10% of the work, whichever is less; one chart, diagram, drawing, cartoon or picture per book or per periodical issue. Special works, like children's books, may contain prose and pictures and not equal 2500 words. These may not be reproduced in their entirety. Rather, a maximum of two pages may copied, provided that this is not more than 10% of the words found in the text.
Spontaneity is copying at the instance and inspiration of the individual teacher and that the time between the decision to copy the work and its use in class is so short as to make seeking permission unreasonable.

Cumulative effect includes copying for one course in the school only. No more than one piece or two excerpts may be copied from the same author and not more than three from the same periodical or collection during one class term. And there can be no more than nine instances of such copying during one class term.

Besides these strictures, there are further prohibitions in the guidelines. Copying cannot be used to create or substitute for anthologies, compilations or collective works. Consumable items, such as test booklets, standardized tests, exercises and workbooks cannot be copied. Copying cannot substitute for the purchase of books, publishers' reprints or periodicals. Copying cannot be directed by an authority higher than the teacher and cannot be repeated in respect to the same item from term to term. Finally, students cannot be charged more than the cost of copying.

The guidelines for copying music, television programs, digital images and multimedia, and for use in distance learning, are all as or more complex than those for book and periodical material. Sheet music may be copied for a performance when it cannot be purchased in time for that performance, but it must be replaced by purchased copies in a reasonable time. Programs and performances may be taped for use but must be destroyed within a stated length of time. (The length of time involved depends upon what is copied and the uses to which it is put.) As a cautionary example, taping a television program for later viewing is permissible; keeping the tape more than 45 days is not. Fair use rules for computer software and for library use are even less clear than for individuals.

The Internet and Email, as well as digital artwork, constitute a new and evolving challenge to copyright law and fair use guidelines. The Internet has allowed for a rich and even fantastic exchange of information and views, and so far the mood and sense of both individuals and government has been to allow the Internet to be "open" and relatively uncontrolled. In practice that means that material placed on the Internet may be accessed and downloaded in ways that make copyright control virtually impossible. The creator of material should keep this fact in mind and note that laws may not prevent free use by others. Material already copyrighted would be subject to law, of course, but enforcement of an individual's copyright claims are even more difficult

when that material has appeared on the Internet than it has been with the advent of copier machines. The "Fair Use of Copyrighted Works" comments that fair use limits for materials found on the Internet are essentially the same as for other media, while also observing that images are particularly problematic because their use normally involves using the entire work.

Recent Developments

Two important congressional acts have been signed into law in the last few years. The Sonny Bono Copyright Term Extension Act of 1998 generally extends all copyright protections by 20 years. The Digital Millennium Copyright Act of 1988 (DMCA) implements two 1996 World Intellectual Property Organization (WIPO) treaties - the WIPO Copyright Treaty and the WIPO Performances and Phonograms Treaty.

Provisions regarding online service provider liability may be of interest to colleges. The new law provides that a college providing chat rooms, sponsoring websites or allowing students and faculty to post material on their network could be considered an online service provider and, as such, liable for third-party copyright infringements. Colleges can avoid liability if they were not involved in creating and posting the infringing content, did not select who received it and blocked access immediately upon receiving notice of copyright violation. However, in creating takedown policies to respond to copyright problems, colleges must also avoid violations of academic freedom and disruption of online courses.

In addition, the DMCA creates an exemption for making a copy of software for purposes of computer maintenance or repair and addresses a number of issues regarding distance education, libraries, making ephemeral recordings and "webcasting" sound recordings on the Internet, among other items not of relevance here.

The U.S. Copyright Office website has an 18-page summary of the DMCA, though that summary warns that "A complete understanding of any provision of the DMCA requires reference to the text of the legislation itself." That text is on the same website.

In respect to distance education, the DMCA does not alter preexisting copyright law, nor does it clarify fair use issues. Rather, it recognizes the need to consider distance education for exemption from some restrictions and calls for a study of the issues involved with the aim of making recommendations to Congress. The DMCA does not address Email issues.

Issues and Questions

Views differ on what and whether an individual's original ideas should be protected and preserved. Recall that by default, original work is protected by copyright without the need for any positive action by the author. If a teacher writes a textbook, for example, that work will most likely be copyrighted, if not by the individual then certainly by the publisher. Here copyright ownership is part of an agreed to mechanism for compensation. Perhaps the overwhelming majority of teachers do not copyright their syllabi and class handouts, simply because the issue of compensation does not arise. Two considerations regarding such materials need to be considered.

(1) Such materials may be reproduced by a college or local printer. The California Education Code (§76365) and Title 5 Regulations on instructional materials (§§59400-59408) place conditions on the sale of such materials. If a college prints such materials and they are unique to the district in which they are produced, the campus bookstore can be the exclusive seller of the material, but the bookstore and/or district cannot make a profit from their sales. However, a faculty author can choose to make a profit by having the bookstore purchase the material from a "vanity publisher."

(2) The author or creator does not want someone else to assert a copyright on his or her work and thereby make it subject to fair use restrictions for the very people for whom it was written or created. Even if the author or creator does not wish to restrict distribution of his or her work, copyrights can assure the producer of universal access to the production. One way to accomplish this is the inclusion of a statement granting unrestricted use of the material provided that the source is acknowledged.

Plagiarism has long plagued institutions of higher learning, and the Internet is now filled with sites offering to produce "term papers" on virtually any topic for a price. Teachers cannot be expected to monitor all these sites or to detect every time a student's work is actually lifted from a website. When copyright issues are involved, as they can be for both teachers and students, the issue of plagiarism becomes fuzzy in itself and may bleed into issues of infringement. Take, for example, the case of an artfully produced multimedia presentation. It may contain text, graphics, bits of film or video footage, music, recorded speech. In that mix, one might find a trademarked logo, a bit of Martin Luther King, Jr.'s "I have a dream" speech, a few bars of music from Philip Glass, a touch of footage from a current film or news program. Has plagiarism occurred? Although the sources may be obvious, must they be cited? Which bits are copyrighted or trademarked? Must permission be sought (and use fees paid) for everything in the presentation? How does one decided what can and cannot be used without seeking permission? It is easy to imagine that more time and energy might go into sorting out the issues raised in these questions than was absorbed in creating the educational presentation itself. Of course, expediency cannot justify copyright violation.

Despite, and in part because of, emerging technologies and the attempt of law to catch up with and cover new forms of communication, courts and legislators are as confused by expanding technologies and expanded use of current technologies as citizens and teachers are. Despite the guidelines referenced and discussed above, there is no clear national or state consensus on how to apply copyright and trademark law to the classroom. The increase in distance education and technology mediated instruction exacerbated questions of copyright ownership, copyright protection and fair use. As the Internet becomes available to almost everyone and Email becomes the preferred mode of communication, copyright concerns fade into the murky territory of privacy rights. Just as copyright control may be little more than a fantasy on the Internet, the privacy of a person's Email communications may be just as unlikely.

Recommendations on Copyright and Fair Use

- Individuals creating original materials should copyright those materials regardless of what they wish to do in regard to their dissemination and use. While a work is automatically copyrighted the instant it is produced, individuals should consider registering a copyright with the U.S. Copyright Office. (Forms for doing so are available by phone and on the website.)
- Individuals creating original materials should review the copyright laws and CONFU guidelines in respect to ownership, especially in regard to issues of making works for hire.
- Users of copyrighted material should carefully review fair use guidelines. Where the guidelines are not absolutely clear, seek permission of the copyright owner for the use desired. For any complex fair use concerns, consult a lawyer with expertise in copyright laws.
- Individuals and institutions should be cognizant of state educational models regarding fair use of copyrighted material.
- Local academic senates should seek to establish through the collaborative consultation process policies on both copyright and fair use. Such policies should be developed in consultation and cooperation with appropriate bargaining agents, since some issues may involve working conditions (e.g., compensation, released time for creation of materials, load factors, assignment of copyright for multimedia materials created by using college/district equipment and facilities). Both owner and user need to be taken into account in such policies.

PRIVACY, PROPERTY RIGHTS, AND FAIR USE: THE PHILOSOPHICAL BACKGROUND

As has been seen so far, legal standards in cyberspace are in a state of flux. Efforts to apply standards which have been developed for the world of print result in a questionable fit in the new electronic media, for even when the old rules seem applicable, their enforceability is problematic. This makes it difficult to provide secure guidelines for faculty, for whom issues of ownership and privacy become critical as Email becomes a principal mode of communication and as more and more instructors develop online materials.

At such a juncture, it might prove useful to seek clarification in a direction other than the legal, namely, the moral. For whatever legal standards ultimately prevail in an electronically networked world, those standards will—or certainly should—rest on a moral foundation. Laws will be drafted and, more importantly, obeyed, because they are perceived as reflecting a sense of the

right ways for human beings to behave toward one another. Whether faculty ever actually argue their case on moral grounds (and it might not be a bad idea to do so), it will at least be helpful to get clear about the ethical commitments upon which their arguments might ultimately rest.

Moral Foundations

In entering the territory of ethical or moral thought, it is useful to recognize that one is crossing the boundary of the discipline of philosophy, and locating oneself within the province of philosophy known as "ethics." It is commonplace for philosophers today to recognize three levels or kinds of ethical thinking.

- *Metaethics:* Metaethics is concerned with an examination of the meaning or significance of ethical statements. If one says that a behavior is "right" or "good," for example, is one saying something about the way the world actually is, or is one imposing one's own private predilections upon a morally neutral reality? The metaethical view called *objectivism* maintains the former; the latter position is known as *subjectivism*. It would seem very important for those debating competing ethical claims ("It is always good to respect peoples' privacy;" "No, it is frequently good to deny peoples' privacy") to agree about the significance of ethical claims in general. Otherwise, wouldn't they just be talking past each other? In fact, it is often the case that people with apparently antithetical metaethical positions are nevertheless in complete agreement about particular values. It is quite possible, to use the sample positions cited, for an objectivist to value privacy because she believes that the world (or God, or the State) requires it, and for a subjectivist to value privacy as a requirement of his own conscience. For the purposes of the current discussion, the important point is that it is possible for those with very different and even contradictory metaethical viewpoints to share common values.

- *Normative Ethics:* Normative ethics involves an examination of the general principles which constitute the foundations of moral judgments. Every individual holds a host of views about the moral worth of a wide variety of things. The normative ethicist searches for the common denominator in all these views. What principle knits together one's views that "privacy is good," that "murder is wrong," and that "education is good"? Is it that subscribing to these views is conducive to human happiness? Or is it that they all accord with God's will as expressed in scripture? Or is it that acting on the contrary views would disrupt the orderly processes of nature? Any one of these could, and at times has, served as a normative ethical principle. To the extent that one's moral views have such a common denominator, one is said to have a "system" of values, and one's ethical thinking is thought to be clear and coherent. The absence of such a unifying principle or, worse, the appeal to contradictory principles, is taken as a mark of ethical confusion. Again, the important point for the current discussion is that individuals with very different normative viewpoints can in fact agree on common values. Two people might both hold the value that murder is wrong, for example, one on the normative ground that this view is conducive to human happiness, the other on the ground that this view is a commandment of God.

- *Applied Ethics:* Applied ethics involves an examination of the moral standards that apply in a specific field of human endeavor or area of human concern. Examples abound: business ethics, legal ethics, medical ethics, sexual ethics, research ethics, environmental ethics, and computer ethics are all instances of applied ethics, as are the statements of "professional standards" that are formulated by those belonging to associations based on their field of employment. Such statements of standards are often little more than a list of "Thou shalts" and "Thou shalt nots." They are of course useful in letting those inside the profession know what is expected of them, and those outside, what they might expect in utilizing their services. However, applied ethics at this level often involves little or no concern with general normative principles (and virtually never a concern with metaethical matters). This lack of more abstract levels of reflection has led in the past to considerable disdain for applied ethics among professional philosophers. Today, though, applied ethics has become a staple in philosophy curricula, involving for the most part the application of normative principles to specific fields, such as medicine, law and technology. In sum, the current discussion is an exercise in applied ethics. In seeking to find the moral standards to which faculty might appeal in their efforts to claim online property and privacy rights, one enters the territory of philosophy, crosses into the province of ethics, and finds that "applied ethics" is the name of the piece of earth upon which one finally stands.

The question again is how can property and privacy be defended. The pattern used by the AAUP in defending academic freedom can be instructive. The AAUP rests their argument on the value of truth: "The common good depends upon the free search for truth and its free exposition" (*1940 Statement of Principles on Academic Freedom and Tenure*). The truth is a good, therefore seeking the truth is a form of right action, and anything which impedes the pursuit of truth is morally wrong, or evil. Academic freedom is then nothing more than the condition for, or of, the unimpeded pursuit of truth. The AAUP does not argue explicitly for the value of truth; rather, it is implied that truth is an ultimate value and that the rightness of seeking the truth is something upon which all people will simply agree. Certainly the AAUP seems to have been largely correct, as few have joined Dostoyevsky's Grand Inquisitor in taking exception to their assumption.

Truth, it would seem, is for most an "end in itself," that is, something so self-evidently valuable that no further argument is required in its support. The same is not the case for "privacy" and "property." In arguing one's case for the right to privacy and to intellectual property, one is going to have to find a value upon which there is the same sort of consensus as there is for the value of truth.

As a matter of fact, the arguments for privacy and property rights (intellectual and otherwise), often contain implicit appeals to normative ethical principles, which are readily recognizable, at least to professional philosophers. The individual's right to privacy in the workplace, for example, is often supported on "utilitarian" grounds. Utilitarianism is the appellation of the ethics chiefly associated with the late eighteenth- and nineteenth-century British philosophers, Jeremy Bentham and John Stuart Mill. Bentham and Mill felt that the rightness of conduct should be judged by its consequences, particularly its effects on human happiness. Thus they expressed their view in the normative ethical maxim, "Always act so as to produce the greatest happiness for the greatest number." So when one argues against policies of Email surveillance or phone

monitoring on the ground that this has the effect of producing unhappy workers, one is appealing to the Principle of Utility. Interestingly, companies often defend their policies by appeal to the same principle, arguing that their customers far outnumber their employees, and thus it is all right to have a few unhappy employees if this results in a large number of satisfied clients.

The eighteenth-century German philosopher, Immanuel Kant, believed that right conduct had nothing to do with its consequences; rather, it had everything to do with one's motive, or the goodness of one's will. One cannot control the consequences of one's actions, Kant maintained, but one can control one's intentions. What makes one's will good, for Kant, was its conformity to a normative maxim, which he called the "Categorical Imperative," and which went, in one of its formulations, "Always treat other human beings as ends and never as means." One hears an implicit appeal to this principle in many arguments against corporate surveillance. It is sometimes argued, for example, that the use of technology to monitor productivity involves treating people like machines, and not as persons. Clearly, this translates readily into the assertion that the employer's actions fail to conform to Kant's maxim.

Virtually all defenses of property rights in the West appeal to principles established by the seventeenth-century British philosopher John Locke. Locke took as axiomatic the view that one's body is one's own property, or that "each man possesses himself absolutely." When one engages in labor, one "joins" the material labored upon to one's body, and the right of ownership becomes extended from one's body to the object of one's labor. "*Labour* being the unquestionable Property of the Labourer, no Man but he can have a right to what that is once joyned to ...." Thus to assert that the book or the painting is mine because I made it is to claim ownership on Lockean grounds.

A little reflection shows that neither the Principle of Utility nor Locke's assertion of one's right to ownership of the extensions of one's body is capable of standing on its own. The Principle of Utility, after all, could be used to justify torture on the ground that the pain of one person is more than offset by the happiness of many. Locke's principle, too, is in need of serious qualification: If one pours a jar of food dye into the ocean in an effort to improve its appearance, does one then own the ocean? And whatever debt a patient might owe to a surgeon, does it extend to becoming her property? Clearly there must be limits to one's obligation to produce happiness and to one's right to the fruits of one's labor.

In fact, both Mill's and Locke's principles are salvaged by combining them with Kant's Imperative, for what is missing from both the Utilitarians and Locke is an assertion of the absolute intrinsic worth of each human being. And it is precisely this to which Kant calls attention in his Categorical Imperative. The requirement that human beings always be treated as ends in themselves and never as means to some further end calls attention to one's common humanity, the link that bonds one with all others, a bond from which flows the value that must inform all human interaction.

The Categorical Imperative does indeed set the proper limit upon the exercise of the Principle of Utility. One can no longer justify torture on the ground of producing "greater happiness," for torture violates the sanctity of personhood. Similarly, the employer who would justify employee

surveillance as conducive to the "greater good," is answered that such conduct treats employees as means, and not as members of "the kingdom of ends."

So, too, the recognition of personhood as a "good in itself" gives definition and substance to Locke. The surgeon cannot own her patient, because the objectification involved in ownership violates the subjectively experienced sense of freedom that is such an essential feature of being human. More importantly for the current discussion, Kant's principle helps in determining when ownership of objects—books, paintings, artifacts—does and does not make sense: An artifact becomes one's property at the point at which one's self is invested in it. It is not enough that it have been produced by one's labor, as the example of the ocean-dyer illustrates; rather, it is necessary that the labor be an act of true "self-expression." Why would it be wrong to purchase a painting, only to burn it? Clearly the offensiveness of such an action springs from the perception that this would be an act of violence, not against a collection of inanimate materials, but against the artist him- or herself. Once the self, then, with its inviolable value, is invested in the work, one has a "right" to it as one's property, but not until then.

Earlier it was pointed out that the value of truth is a matter of virtually universal consensus, and thus provides a secure moral foundation for one's advocacy for academic freedom. It would seem now that a recognition of the inherent worth of the individual might provide a similarly secure basis for one's case for privacy and for intellectual property rights. In arguing against an employer's surveillance of Email, one ought to be able to say, "By invading my privacy, you diminish me." And in making a claim to one's intellectual property, it should suffice to say, "That book is mine in the same way that I own my hand or my eye." Once it is clear that one's right to privacy and to the fruits of one's intellectual labor are grounded in a recognition of the inherent worth of each human being, there should be no further need for argument. And there will not be, except when dealing with those who are accustomed to treating other people as means to their ends, rather than as ends in themselves.

RECOMMENDATIONS FOR LOCAL ACADEMIC SENATES

The Academic Senate for California Community Colleges endorses the principle that academic freedom applies equally to material in electronic format as to traditional print material, and therefore recommends to local academic senates that:

- Each local academic senate ensures that their local electronic/computer use policy includes a statement of the fundamental principle of academic freedom in the electronic medium.

- Each local academic senate is involved in creating and implementing the process that deals with possible exceptions or violations.

The Academic Senate for California Community Colleges endorses both the fundamental principle that Email communication between faculty members and between faculty and students is confidential, and the practical acknowledgment that Email is an insecure medium, and therefore recommends to local academic senates that:

- Each local academic senate ensures that their local electronic/computer use policy includes a statement of the fundamental principle of the confidentiality of Email communications, while urging practical caution regarding the inherent lack of absolute security.
- Each local academic senate works with collective bargaining colleagues to create contract language creating and implementing the process that deals with confidentiality and with possible exceptions and technical safeguards or limitations.

The Academic Senate for California Community Colleges encourages local academic senates to urge individual faculty members to carefully consider issues of copyright and fair use, and therefore recommends that:

- Individuals creating original materials should copyright those materials regardless of what they wish to do in regard to their dissemination and use. While a work is copyrighted the instant it is produced, individuals should consider registering a copyright with the U.S. Copyright Office. (Forms for doing so are available by phone and on the website.)
- Individuals creating original materials should review the copyright laws in respect to ownership, especially in regard to issues of making works for hire.
- Users of copyrighted material should carefully review fair use guidelines. Where the guidelines are not absolutely clear, seek permission of the copyright owner for the use desired. For any complex fair use concerns, consult a lawyer with expertise in copyright laws.
- Individuals and institutions should be cognizant of state educational models regarding fair use of copyrighted material.
- Each local academic senate should seek to establish through the collaborative consultation process policies on both copyright and fair use. Such policies should be developed in consultation and cooperation with appropriate bargaining agents, since some issues may involve working conditions (e.g., compensation, released time for creation of materials, load factors, assignment of copyright for multimedia materials created by using college/district equipment and facilities). Both owner and user need to be taken into account in such policies.

AN ALTERNATIVE THOUGHT FOR INDIVIDUAL FACULTY

[Note: The following section is intended as food for serious thought; it is not proposed, in itself, as a position of the Academic Senate.]

The earlier sections of this paper describe how to protect a variety of intellectual property and activities. Some individual faculty may choose a different solution.

The "Fair Use of Copyrighted Works" states that higher education's legitimate right to use copyrighted works must be protected and that processes for this use in electronic format should not impose a myriad of separate approval transactions.

When faculty come to publishing the fruits of their intellectual labor on the Internet, their rights to compensation are essentially whatever they can negotiate. Examples are provided in Tyner's "Guidelines for Negotiating Distance Education Issues" and the 1992 "University of California Policy on Copyright Ownership" which is very detailed but does not mention technology. Perhaps some individual faculty would value a different philosophical approach.

Marshall McLuhan, author of such works as *Understanding Media* and *The Medium is the Massage*, wrote that "When faced with a totally new situation, we tend always to attach ourselves to the objects, to the flavor of the most recent past. We look at the present through a rear-view mirror. We march backwards into the future."[1]
On one level, the reason that it is difficult to give advice about copyright and fair use on the Internet is because it involves fitting the rules created for print media to an entirely different medium, namely a global computer network. The new medium is sufficiently different that there is no easy fit.

Beyond this, however, it seems possible that the very concern with intellectual property rights on the Internet is itself an instance of looking at the present through a rear-view mirror, of trying to experience the electronic-media world through print-media eyes. "The alphabet and print technology," McLuhan wrote, "fostered and encouraged a fragmenting process, a process of specialism and detachment."[2] Print also made possible the contemporary notion of "authorship," the commodification of one's thoughts and ideas, and fostered "ideas of literary fame and the habit of considering intellectual effort as private property."[3] "Electric technology," on the other hand, "fosters and encourages unification and involvement"[4] and marks the emergence of a single, global consciousness.[5]

The early world of cyberspace was characterized by a palpable spirit of openness, of freedom, and of sharing the fruits of one's creative efforts. The medium's "message" seemed clear: The

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1 Marshall McLuhan, Quentin Fiore, Jerome Agel, *The Medium is the Massage: An Inventory of Effects* (Original copyright, 1967. Reprinted: San Francisco, Hardwired 1996) 74-75.
2 *Ibid., 8.*
3 *Ibid., 122.*
4 *Ibid., 8.*
5 Marshall McLuhan, *Understanding Media: The Extensions of Man* (Original copyright, 1964. Reprinted: Cambridge, Massachusetts, The MIT Press 1994) 3-4, 61.

global network was a liberating alternative to the world of "mine" and "yours," of property and the rights to it. This was a counter to the world of competition for pecuniary gain, offering instead progress through cooperation. The other side of this same message seems to be found in the virtual impossibility of ensuring property rights on the Internet: the medium itself seems positively hostile to the concept of private property.

McLuhan, again, provides a possible context for understanding what is going on here. "After three thousand years of explosion," he wrote, "by means of fragmentary and mechanical technologies, the Western world is imploding. During the mechanical ages we had extended our bodies in space. Today, after more than a century of electric technology, we have extended our central nervous system itself in a global embrace, abolishing both space and time as far as our planet is concerned. Rapidly, we approach the final phase of the extensions of man—the technological simulation of consciousness, when the creative process of knowing will be...extended to the whole of human society, much as we have already extended our senses and our nerves by the various media."[6] And, he asks, "might not our current translation of our entire lives into the spiritual form of information seem to make of the entire globe, and of the human family, a single consciousness?"[7]

So where does this leave us on the subject of compensation for intellectual property? Perhaps as salaried educators, we can recreate and extend the spirit of the early Internet in order to pursue knowledge and to educate. If successful communication of knowledge to others is the ultimate reward, perhaps attempts to control ownership should be abandoned. Within the unity of consciousness there is no "mine" and "yours." Perhaps for some it is time to start thinking and acting more like a single, global consciousness, and less like buyers and sellers.

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